Supreme Court, U.S.
FILED

94 1814 MAY 4 1995

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No. _____

In the Supreme Court of the United States

October Term, 1994

CATHY BURNS, *Petitioner,*

v.

RICK REED, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

May, 1995

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QUESTIONS PRESENTED

A government actor is entitled to the protection of qualified immunity in actions brought pursuant to 42 U.S.C. § 1983 when the contours of the right alleged to have been violated are clearly established. United States Supreme Court cases have proscribed the use of techniques in criminal interrogations which may produce a confession which is not the result of a free and voluntary will, including the use of a drug having the properties of a "truth serum." In 1982, Cathy Burns, a suspect in the shooting of her two sons, was hypnotized by police officers with the approval of then-deputy prosecutor Rick Reed. She was subsequently arrested, although all criminal charges against her were dropped. She brought suit against Reed under Section 1983, claiming Reed violated her constitutional rights.

I. Is a deputy prosecutor entitled to the protection of qualified immunity when he gives approval to police officers to hypnotize a suspect in a criminal investigation when case law prohibits the use of interrogation techniques which deprive the suspect of the use of her free will?

II. Is a deputy prosecutor, who is also a law enforcement officer under Indiana law, entitled to qualified immunity when he authorizes the arrest of a suspect based upon her hypnotically-induced statements?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Cathy Burns, and the respondent, Rick Reed, Deputy Prosecuting Attorney for Delaware County, Indiana.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner, Cathy Burns, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on February 6, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 44 F.3d 524 (7th Cir. 1995), and is reprinted in the Appendix hereto, p. A–1, *infra*.

The decision of the United States District Court for the Southern District of Indiana (Tinder, D.J.) has not been reported. It has been transcribed and reprinted in the Appendix hereto, p. A–10, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit on January 31, 1985, in the United States Court for the Southern District of Indiana. Petitioner proceeded to trial, and on November 4, 1988, the District Court granted the respondent's motion for a directed verdict.

On petitioner's appeal, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's order directing a verdict in favor of the respondent on February 6, 1990. No petition for rehearing was sought.

On May 7, 1990, the petitioner filed a petition for a writ of certiorari to this Court. This Court granted the petition for a writ of certiorari, and issued its decision in *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934 (1991). On remand, the United States Court of Appeals for the Seventh Circuit remanded the case to the District Court.

On February 26, 1993, the District Court (Tinder, D.J.) granted the respondent's motion for summary judgment on the basis of qualified immunity. The petitioner appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed the District Court's ruling on January 5, 1995. The petitioner filed a petition for rehearing with suggestion for rehearing *en banc*, which was denied on February 6, 1995.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of 42 U.S.C. § 1983 and Indiana Code Sections 33-14-1-3, 35-33-1-1, and 35-41-1-17 are reproduced verbatim in the Appendix, p. A–24, *infra*.

STATEMENT OF THE CASE

This case was initiated by Cathy Burns on January 31, 1985, by the filing of a complaint in the United States District Court for the Southern District of Indiana against Rick Reed, the deputy prosecutor for Delaware County, Indiana.[1] Burns sought actual and punitive damages against Reed for the violation of her constitutional rights while Reed acted under color of state law. The District Court had jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1343 (a) (3) and (4), as the suit was brought under 42

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[1] The original complaint named ten defendants. The claims against defendants Muncie Police Department and several other individuals were dismissed by the District Court. The case continued against defendants Scroggins, Cox, and Stonebraker, who were investigating officers in the Muncie Police Department, and Rick Reed, deputy prosecutor for Delaware County, Indiana. Scroggins, Cox, and Stonebraker settled with Burns for sums of money totaling $250,001.00. The case against Reed continued to trial.

U.S.C. § 1983 to redress the deprivation of Burns's constitutional rights.

On the evening of September 2, 1982, an unknown person entered the home of Cathy (Sells) Burns,[2] the petitioner, which is located in Muncie, Indiana. The intruder shot the two children of Burns and attacked her with a blunt instrument. Burns was a reserve police officer working as a civilian radio dispatcher, and was able to fire one shot from her service revolver before the intruder overpowered her. She was awakened by one of her children, and after assessing the injuries to both of them, she called the police dispatcher. A message was scrawled on a mirror in the home with lipstick: "I took what you loved most." All three persons received medical treatment including emergency surgery at Methodist Hospital in Indianapolis, Indiana.

Two Muncie police officers, Cox and Scroggins, formed the opinion that Burns was a prime suspect in the shooting. Although there was no admissible or reliable evidence to establish probable cause, the officers remained focused in their investigation on Burns. The officers questioned her on numerous occasions but she repeatedly denied shooting her two sons. The officers asked Burns to submit to a polygraph examination, and she did so. The examination results supported her claim of innocence. Burns also submitted to numerous handwriting exemplars which were also exculpatory. On the morning of September 21, 1982, the officers asked Burns to submit to a voice stress analysis test, which again revealed Burns was truthful in denying any involvement in the crime.

The officers continued their interrogation throughout the day of September 21, 1982, and denied Burns the opportunity to eat, causing her to become so lightheaded that she fainted while at the detective's office. This dizziness and the fact that she vomited in the restroom did not deter the officers from pursuing their theory and persuading Burns to submit to questioning under hypnosis.[3]

It was at this time that the testimony of Officers Cox and Scroggins differs significantly from the testimony of Reed. The police officers insisted that Reed was contacted before Burns was placed under hypnosis. Reed authorized and approved the hypnosis, despite being warned by Officer Scroggins that Cox was taught in his hypnosis course that the hypnosis of criminal suspects was improper. Reed recalled no such conversation and testified only that

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[2] Ms. Burns changed her surname from Sells to Burns when she married.

[3] Officer Cox completed a course in forensic hypnosis over one year prior to his hypnotizing of Cathy Burns. One of Officer Cox's instructors was Ellen Dilk, who received her training in part from John Daniel Tinder, who coincidentally is the District Court judge who ruled on Reed's motion for summary judgment.

he was contacted at home sometime after 5:00 P.M. Reed assumed that Cathy Burns was a suspect in the case.

Officer Cox, now having Reed's permission, placed Burns in a hypnotic state and videotaped the questioning, omitting the preliminary preparation. With Scroggins in the room, Cox continued the interrogation of Cathy Burns while she was hypnotized, and on numerous occasions challenged her truthfulness and placed her under a deeper and deeper trance. While under hypnosis, Burns made statements which Cox and Scroggins interpreted as evidencing a multiple personality. The videotape of the hypnotic interrogation also shows that Cox made an unscrupulous post-hypnotic suggestion that Burns would not remember the hypnosis and would fully cooperate with the officers' investigation of the crime.

The record reflects that Reed came down to the police station in the evening of September 21, 1982, and met with Officers Cox and Scroggins. According to the testimony of Cox and Scroggins, Reed viewed the videotape. Reed testified he did not recall viewing the videotape. Officers Cox and Scroggins discussed the videotape of Burns' hypnosis with Reed, and the officers specifically requested Reed's advice or permission as to whether to arrest Burns. Officer Cox testified that he probably would have not arrested Burns if Reed had indicated otherwise. Reed, Scroggins and Cox decided to arrest Cathy Burns.

During this meeting, Cox, Scroggins and Reed decided they would not reveal to the public that Burns had been hypnotized or what their source of information was regarding various matters of evidence. Reed also participated in the decision to have Burns transported to the psychiatric ward of Ball Memorial Hospital. Reed spoke with Dr. Ken Joy, a psychologist, regarding whether Burns was suffering from multiple personality disorder, and Dr. Joy told Reed he believed Burns suffered from such a disorder. Reed advised the police officers that probable cause existed to arrest Cathy Burns. Reed participated in her arrest, and decided that Burns should be taken to the psychiatric ward at Ball Memorial Hospital.

The following day, Officer Scroggins and Reed sought a search warrant from the Honorable Betty Shelton Cole. At the search warrant hearing, Reed told Judge Cole of Burns' "confession," but he did not tell her it was obtained while Burns was under hypnosis. The judge was also not told of the two stated claims of innocence by Burns. Judge Cole issued the search warrant while she was totally unaware of the fact that the information presented by Reed was extracted by the blatant misuse of forensic hypnosis.

Cathy Burns' children were removed from her custody immediately. Eight days after her arrest, and six days after the search warrant was obtained, Officer Stonebraker submitted an

affidavit to Judge Cole in support of probable cause to issue an arrest warrant. Again, the information presented to Judge Cole did not inform her that the interrogation of Cathy Burns was done while she was under hypnosis.

Burns was detained in the psychiatric ward at Ball Memorial Hospital when the judge issued the warrant charging her with the attempted murder of her two sons, and she remained in the psychiatric ward for approximately four months. During that time, Burns was humiliated and suffered from depression (she would spend her time knitting items she could sell to the hospital staff so she could earn money to buy Christmas presents for her children). Also during that time, Burns was observed and tested by several experts for the state and for her defense, all of whom concluded that she did not suffer from a multiple personality disorder.

When Burns' criminal case came before the state court, the court granted her motion to suppress the statements made while under hypnosis. In the face of this development, the prosecutor's office dismissed all criminal charges against her.

Because of the media attention and damaging statements made by the police and Reed, as well as remarks made by the fathers of the two children, a civil court ruled it was in the children's best interests that they not be returned to their mother. The oldest child, Eddie, was allowed to return to Cathy Burns' custody in 1986. The younger child, Denny, was denied by his father the opportunity to live with Burns, and was not able to visit with her until 1988. Following her release, Burns attempted to regain her position with the Muncie Police Department, but was unable to do so because of the accusations made during her employment hearing as well as statements made in public by various police officers and Reed.

Because of the depression she experienced, Burns sought the assistance of various psychiatric professionals. One psychiatrist and another psychologist identified Burns' condition as the equivalent of post traumatic stress disorder, and presented evidence at trial of the impact and consequences of such a condition on Burns and her family.

The case went to trial before the District Court, and the District Court entered judgment for Reed on his motion for a directed verdict on the grounds of absolute immunity made at the conclusion of Burns' case in chief. Burns appealed to the United States Court of Appeals for the Seventh Circuit. That court, in an opinion by Chief Judge Bauer and joined by Circuit Judges Cummings and Ripple, affirmed the District Court's decision, holding that the doctrine of absolute immunity barred Burns' claim against deputy prosecutor Reed. On appeal to this Court, Burns won reversal of the opinion of the appellate court, and Reed was relieved of the protection of absolute immunity. On remand from the court of

appeals, the District Court granted Reed's motion for summary judgment on the grounds of qualified immunity. Burns again appealed to the United States Court of Appeals for the Seventh Circuit. The appellate court, in an opinion by Circuit Judge Cummings, joined by Circuit Judges Eschbach and Kanne, upheld the District Court's ruling that Reed was protected by the doctrine of qualified immunity. It is from this ruling that Burns seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The heightened requirements imposed by the United States Court of Appeals for the Seventh Circuit to overcome the affirmative defense of qualified immunity have created an absolute barrier to vindicating individual rights unless a case with identical facts and which holds the challenged actions unconstitutional is presented. This case presents the Court with the opportunity to correct the error of the United States Court of Appeals for the Seventh Circuit when it failed to correctly apply the qualified immunity analysis in its decision in this case, as well as to resolve a conflict among the federal courts of appeals in the application of the qualified immunity analysis. The Seventh Circuit's unwarranted disregard for applicable precedent of this Court endangers the rights and liberties guaranteed by the United States Constitution and thus requires this Court's attention. This case also presents the Court with the opportunity to resolve a conflict among the various circuit courts of appeals in how the courts determine whether the contours of the right at issue are clearly established, and thus provide for the uniform application of the qualified immunity doctrine.

I.

The United States Court of Appeals for the Seventh Circuit failed to obey the requirements of this Court as set forth in *Anderson v. Creighton* and *Harlow v. Fitzgerald.*

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court abandoned the subjective, good faith component of the qualified immunity analysis, and stated that a defendant is entitled to qualified immunity unless the defendant violates "clearly established statutory or constitutional rights of which a reasonable person would have known." In the case of *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), this Court reaffirmed the principle that

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,... but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. at 640, 107 S.Ct. at 3039 (citations omitted).

The United States Court of Appeals for the Seventh Circuit failed to follow the teachings of *Anderson* and *Harlow*. In applying the qualified immunity analysis, the court must frame the question in terms of whether the right allegedly violated was clearly established at the time the challenged actions occurred. The court could frame the question with three levels of generality: it can frame the question broadly, such as whether the right to be free from unreasonable searches and seizures is well established. This Court in *Anderson* cautioned against framing the question too broadly, given that it would turn qualified immunity into a rule of virtually unqualified liability. 483 U.S. at 639, 107 S.Ct. at 3039. The court could frame the question very narrowly, which this Court has also said is inappropriate. *Id*, 483 U.S. at 640, 108 S.Ct. at 3039. As Judges Higginbotham and Politz noted in *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 465 (5th Cir. 1994) (en banc):

> Justice Scalia pointed out in *Anderson v. Creighton* [citation omitted] the hazards of framing the legal question at too great a level of generality. The error can be made in the opposite direction—a search so narrowed that legal nuance rises to uncertainty and ultimately confounds common sense.

The third possible way to frame the legal question is as this Court has called for: the specific facts of the case must be applied to the law available to the defendant government official at the time of the challenged actions. This Court has held repeatedly that the very action in question does not have to have been previously held unlawful. *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039. Despite this statement of the law from this Court, some circuit courts of appeals have required a plaintiff in a particular case to produce case law holding the challenged action to be unconstitutional. The United States Court of Appeals for the Seventh Circuit did so in the present case:

> Plaintiff here must offer more than the fact that federal case law clearly frowns on coercive interrogation; *she must demonstrate that coercive interrogation clearly includes hypnosis, and did so at the time of the events in question. ...*
>
> Plaintiff thus would need to cite more specific precedent than the basic line of coercion cases to persuade this Court that the United States Constitution clearly proscribed hypnosis of a suspect at the time of her interrogation.

44 F.3d at 528 (emphasis added). This requirement exceeds the bounds of this Court's rule as stated in *Anderson*. The United States Court of Appeals for the Seventh Circuit has unwittingly invited prosecutors and police officers to hypnotize suspects as a result of its conclusion that there is no clear prohibition against such conduct.

Cathy Burns presented two cases she believed were closely analogous to the use of hypnosis on a suspect.[4] The first, *Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954), involved a psychiatrist who was brought in by police officers to aid in the interrogation of a man suspected of murdering his parents. The suspect suffered from acute sinus attacks, and the police officers brought in the psychiatrist under the guise that he would provide some medical relief to the suspect. The psychiatrist had a considerable knowledge of hypnosis. This Court noted that, "an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist." 347 U.S. at 561, 74

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[4] Arguably, the more egregious and outrageous the challenged conduct is, the more difficult it will be to find a commanding precedent. Clearly, there is no case which holds that it is unconstitutional to hypnotize a suspect in a criminal case for the purpose of interrogating the suspect. In her brief to the Seventh Circuit, Cathy Burns pointed out that similarly, there are no cases prohibiting the use of the rack and screw to interrogate a suspect. The Seventh Circuit, in another case, noted that in some cases, "the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles." *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994). Given the clear absence of cases where police officers have hypnotized suspects in order to interrogate them, one is lead to question whether the challenged actions in this case are so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that their actions are unlawful. *See Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993). Regrettably, the Seventh Circuit declined to rule on the constitutionality of hypnotizing suspects and thus offer guidance to persons facing the issue in the future.

S.Ct. at 719, and ruled that the suspect's constitutional rights had been violated by the interrogation.

Cathy Burns also presented the case of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In *Townsend*, a suspect was injected by a police doctor with a drug which had the properties of a "truth serum" under the guise of relieving symptoms of drug withdrawal. After the injection, and while under the influence of this drug, the suspect was interrogated by police officers, and eventually confessed. This Court ruled that the suspect had properly alleged a violation of his constitutional rights.

Despite presenting these two cases to the United States Court of Appeals for the Seventh Circuit in this case, Cathy Burns was unable to persuade the Court of Appeals that the law was clearly established regarding the use of non-physical methods of interrogation which deprive the suspect of her ability to resist questioning. The Seventh Circuit ignored the factual similarities in the two cases to those presented by Cathy Burns, and instead merely cited *Townsend* for basic constitutional law principles. 44 F.3d at 527; Appendix, p. A–4.

Reed has argued throughout these proceedings that the cases relied upon by Burns deal with the admissibility of confessions obtained by unconstitutional means, and thus Cathy Burns's rights were apparently vindicated when her alleged "confession" was suppressed by the state trial court. While it is true that the courts hold that the admission of an unconstitutional confession violates a defendant's due process rights, it is equally true that some methods of interrogation are offensive to the constitution in themselves. *See Brown v. Mississippi*, 297 US. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936). While the exclusion of unconstitutionally obtained confessions protects the rights of the accused, Section 1983 protects the rights of those who suffered harms other than a criminal conviction. Under Reed's logic, a criminal suspect could be placed on the rack and tortured until he confesses. The police could put the confession in the drawer, the prosecutor could never press charges, and the suspect would be without means to seek redress. If qualified immunity becomes the effective equivalent of absolute immunity, then individuals will have no judicial forum in which to seek redress for the violation of their constitutional rights.

In the present case, Cathy Burns suffered substantial harm as a result of the unconstitutional interrogation which Reed authorized. She was detained in the psychiatric ward for four months. She lost the custody of her children. She lost her employment. The suppression of her statement made while under hypnosis does not begin redress these injuries.

II.

The analysis used by the United States Court of Appeals for the Seventh Circuit conflicts with the analysis used by other United States Courts of Appeals.

The application of the qualified immunity analysis varies substantially among the circuit courts of appeals, and even among different panels of the same circuit. This case presents this Court with the opportunity to mandate uniform application of this important principle of current Section 1983 law.

As noted above, the United States Court of Appeals for the Seventh Circuit required Cathy Burns to present a "case on all fours" with the challenged action of the deputy prosecutor. *See Burns v. Reed*, 44 F.3d at 528.

In contrast, the United States Court of Appeals for the Fifth Circuit does not require a plaintiff to present a "case on all fours." In the case of *Doe v. Taylor Indep. School Dist.*, 15 F.3d 443 (5th Cir. 1994) (en banc), *cert. denied*, — U.S. —, 115 S.Ct. 70 (1994), the Fifth Circuit confronted a case where the plaintiff, a female high school student, sued a high school teacher, principal, and school corporation, claiming that her right to be free from sexual abuse was violated by the teacher. The defendants claimed that the student's right to be free from sexual abuse and her right to bodily integrity were not clearly established under existing law. The Fifth Circuit did not agree with the defendants' argument, having examined the body of case law concerning the issues at hand. The Fifth Circuit did not find a case "on all fours" with the facts of the case before it, nor did it require the plaintiff to present one.

In reaching its conclusion, the Fifth Circuit reviewed case law concerning the issue of bodily integrity. It began its examination with *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), in which a New Orleans police officer used his nightstick to strike a tourist who had photographed the officer arresting a suspect. The court held in that case that the police officer's actions violated the tourist's right to bodily integrity. The court next considered its holding in *Jefferson v. Ysleta Independent School Dist.*, 817 F.2d 303 (5th Cir. 1987), in which it held that the Due Process Clause protects a schoolchild from being lashed to a chair for the better part of two days. Finally, the court cited its decision in *Fee v. Herndon*, 900 F.2d 804 (5th Cir.), *cert. denied* 498 U.S. 908, 111 S.Ct. 279 (1990), in which the court held that corporal punishment in the public schools can be a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.

It was from these three cases, with varying factual situations, that the Fifth Circuit was able to conclude that the law concerning the high school student's right to bodily integrity and her right not to be sexually molested by her biology teacher were clearly established when the challenged actions occurred.

In reaching this conclusion, the Fifth Circuit noted, "The term 'clearly established' does not necessarily refer to 'commanding precedent' that is 'factually on all fours with the case at bar' or that holds the 'very action in question' unlawful. *Doe*, 15 F.3d at 455, citing *Jefferson, supra*, 817 F.2d at 305.

This approach is also followed by the United States Court of Appeals for the Tenth Circuit, *See Eastwood v. Department of Corrections of State of Okl.*, 846 F.2d 627, 630 (10th Cir. 1988), as well as the United States Court of Appeals for the Third Circuit. *See People of Three Mile Island v. Nuclear Reg. Com'rs.*, 747 F.2d 139, 144-45 (3rd Cir. 1984) (collecting cases requiring decisions with strict factual similarity to the challenged actions). In this decision, the Third Circuit observed that the "clearly established" requirement

> poses at least two ambiguities. First, as the Supreme Court acknowledged, lower courts are not informed whether two conflicting opinions from different district courts, or even a split decision in the court of appeals, makes the law sufficiently unclear to mandate the granting of immunity.
>
> The second, and more difficult, uncertainty in employing the "clearly established" standard involves the determination of how close a factual correspondence is required between applicable precedents and the case at issue.

The Third Circuit went on to conclude:

> We adopt the second approach—requiring some but not precise factual correspondence and demanding that officials apply general, well developed legal principles. Such a formulation of the law better strikes the balance between the competing interests that the Supreme Court identified [in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)] when it fashioned the contours of executive immunity. While we cannot expect executive officials to anticipate the evolution of constitutional law, neither can we be faithful to the purposes of immunity by permitting such officials one liability-free violation of a constitutional or statutory requirement. Insisting on a precise factual correspondence between the conduct at issue and reported case law is tantamount to such a license.... Moreover, requiring officials to consider the

> legal implications of their actions should have a salutary effect.

Id., 747 F.2d at 144-45 (citation omitted). The United States Court of Appeals for the Eighth Circuit also applies a more flexible standard, *J.H.H. v. O'Hara*, 878 F.2d 240 (8th Cir. 1989) (the Eighth Circuit applies a flexible standard, requiring some, but not precise factual correspondence with precedent, and requiring that officials apply general, well-developed legal principles), as does the United States Court of Appeals for the Eleventh Circuit. *See Cannon v. Macon County*, 1 F.3d 1558 (11th Cir. 1993); *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990).

The qualified immunity analysis can be applied differently even among panels within the same circuit court of appeals. The United States Court of Appeals for the Sixth Circuit reached two different conclusions over whether local jail officials are protected by qualified immunity in the case of inmate suicides and the failure to provide immediate medical treatment. In *Heflin v. Stewart County*, 958 F.2d 709 (6th Cir. 1992), *rehearing granted in part on reconsideration*, 968 F.2d 1, *cert. denied*, 113 S.Ct. 598 (1992), one panel of the Sixth Circuit concluded that:

> There can be no doubt that in 1987 existing law clearly established the right of pretrial jail inmates to receive care for their serious medical needs. At least as early as 1985 we recognized this right as the basis for section 1983 claims involving jail suicides by hanging....The unlawfulness of doing nothing to attempt to save [the inmate's] life would have been apparent to a reasonable official in [defendant's] position in light of pre-existing law.

958 F.2d at 717.

In contrast, a different panel facing very similar facts reached a very different conclusion:

> [The] generalized right of a prisoner to be free from deliberate indifference cannot support a finding that there was a clearly established right to be protected from committing suicide....The "right" at issue in the instant appeal is the right of a pretrial detainee to be cut down by police officers when discovered hanging in a jail cell.

Rich v. City of Mayfield Heights, 955 F.2d 1092, 1096-97 (6th Cir. 1992).

The varying conclusions from the application of the qualified immunity doctrine between the several circuit courts of appeals, and

even among different panels of the same circuit court of appeals, offend the notions of uniform application of the laws. A plaintiff's ability to vindicate her constitutionally protected rights will depend not only on the geographical location of the constitutional violations, but also upon the random chance which determines the selection of the jurists who will compose the panel reviewing the determination of the district court judge. Without the intervention of this Court to correct these flaws, justice will be available only to those who chose to live in the right place and who were fortunate to have the right judges chosen.

CONCLUSION

For all of the foregoing reasons, Cathy Burns respectfully requests this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 93-1711

CATHY BURNS,

Plaintiff-Appellant,

v.

RICK REED,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 85 C 155—**John D. Tinder**, *Judge.*

ARGUED NOVEMBER 29, 1994—DECIDED JANUARY 5, 1995

Before CUMMINGS, ESCHBACH and KANNE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case presents the narrow question of whether the defendant, a Muncie, Indiana, deputy prosecuting attorney, is entitled to qualified immunity from suit under 42 U.S.C. § 1983 for his actions concerning the 1982 interrogation and subsequent arrest of plaintiff Cathy Burns for allegedly shooting her two sons. Defendant authorized interrogation of plaintiff while she was under hypnosis and later advised Muncie police officers, based primarily on the results of the hypnosis session, that they had probable cause to arrest plaintiff. As it turned out, both of these decisions may have been ill-advised; all charges were later dropped against plaintiff, and the hypnosis session was roundly discredited as

inept. Nevertheless, because qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law," *Burns v. Reed*, 500 U.S. 478, 495 (citation omitted), it provides defendant with shelter from suit in the instant case.

FACTS

The factual background of this case has been set forth in detail in its previous journey through this Circuit.[1] A brief summary of the facts is necessary, however, to understand the nature of plaintiff's claim.

On September 2, 1982, an intruder entered plaintiff's Muncie, Indiana, home, shot and wounded her two sons, and scrawled a threatening message on her mirror. Muncie law enforcement personnel soon turned their attention to plaintiff as their primary suspect, although she repeatedly denied any involvement in the crime. Plaintiff took and passed a polygraph examination and a voice stress test, and provided handwriting exemplars which were exculpatory, but investigating officers continued to view her as the prime suspect.

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[1] Cathy Burns originally filed a complaint against ten defendants including Rick Reed on January 31, 1985. The lower court dismissed claims against several of the defendants prior to trial; three other defendants settled with Burns for a sum of money totaling $250,001. After Burns presented her case at trial, the judge directed a verdict for Reed on the grounds that as a prosecutor he was entitled to absolute immunity. This Court affirmed the ruling. *Burns v. Reed*, 894 F.2d 949 (1990). The United States Supreme Court reversed, holding that prosecutors are entitled only to qualified immunity for actions undertaken in an investigative role rather than one intimately associated with the judicial phase of the criminal process. *Burns v. Reed*, 500 U.S. 478. On remand, district judge Tinder granted defendant's motion for summary judgment, finding that qualified immunity insulated him from suit (Feb. 26, 1993 Order). It is that decision which we now consider on appeal.

On September 21, 1982, following a daylong interrogation, two police officers convinced plaintiff to submit to questioning under hypnosis. Before proceeding, one officer contacted defendant—a deputy prosecuting attorney for the county—at home to inquire whether the proposed course of action of hypnotizing their chief (although as-yet unarrested) suspect was proper; defendant gave the go-ahead. The officers proceeded with the hypnosis, and in the course of their questions elicited statements which led them to believe that plaintiff might suffer from a multiple personality disorder and might have committed the shootings. After learning of the results of the hypnosis session and consulting with a psychiatrist, defendant informed the officers that they likely had probable cause to arrest plaintiff. The officers subsequently arrested plaintiff and detained her in a psychiatric ward, where she remained for four months until experts concluded that she did not suffer from a multiple personality disorder. The prosecutor's office dismissed all charges against plaintiff after the trial court granted her motion to quash the statements made under hypnosis.

ANALYSIS

Plaintiff now appeals the district court's finding, on remand from the United States Supreme Court, that defendant was entitled to qualified immunity for his actions in authorizing the hypnosis and later the decision to arrest her. She faces a heavy burden. Qualified immunity protects public officials from civil suit based on their discretionary functions except where such conduct violated "clearly established" law. *Sherman v. Four County Counseling Center*, 987 F.2d 397, 407 (7th Cir. 1993). The Supreme Court's test for qualified immunity has been summarized by this Court as follows:

> In determining whether the right alleged to have been violated was "clearly established," the constitutional right must be identified in a particularized sense with respect to the circumstances of the alleged

> violation. In other words, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The plaintiff bears the burden of showing that the constitutional right allegedly violated was clearly established before the defendant acted or failed to act. This requires the plaintiff to offer either a closely analogous case or evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts.

Casteel v. Pieschek, 3 F.3d 1050, 1053 (7th Cir. 1993) (quotation marks and citations omitted), quoted in *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 737 (7th Cir. 1994). The analysis requires two findings: that the alleged conduct violated a constitutional right; and that the right was clearly established at the time that the violation occurred. *Sherman*, 987 F.2d at 407. Failure on either prong will defeat the attempt to overcome immunity, which we review *de novo*. *Maltby v. Winston*, 36 F.3d 548, 555 & n.7 (7th Cir. 1994); *Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir. 1988) (en banc), certiorari denied, 488 U.S. 968.

I.

In seeking to demonstrate that hypnosis violated her constitutional rights, plaintiff offers a range of case law that proscribes in no uncertain terms the extraction of coerced confessions as a constitutional violation. See, *e.g.*, *Brown v. Mississippi*, 297 U.S. 278 (use of physical torture to extract confession violates due process); *Rogers v. Richmond*, 365 U.S. 534, 540-541 (coerced confessions "offend an underlying principle in the enforcement of our criminal law" and violate due process); *Townsend v. Sain*, 372 U.S. 293 (any confession which is "not the product of a free intellect" is inadmissible because coerced). Plaintiff points out, correctly, that psychological as well as physical pressure can overbear a suspect's will such that a resulting statement violates due process. "[N]either the

body nor mind of an accused may be twisted until he breaks." *Culombe v. Connecticut*, 367 U.S. 568, 582; see *Arizona v. Fulminante*, 499 U.S. 279, 286-287 n.2; *Smith v. Duckworth*, 856 F.2d 909, 912 (7th Cir. 1988) (setting forth numerous relevant factors to be used in determining whether defendant's will was overborne, including age, educational level, intelligence, length of detention, duration of questioning, as well as existence of physical punishment or deprivation).

It is no small leap from this well-established, albeit heavily fact-dependent, body of due process case law, which generally proscribes the physical or psychological coercion of confessions, to the conclusion that statements elicited from a suspect under hypnosis are *per se* coerced or that the use of hypnosis on a suspect is *per se* coercive. Criminal interrogations often rely on tactics that are at least arguably manipulative and by definition designed to extract information from recalcitrant suspects, while still falling within the boundaries of what is constitutionally permissible. Hypnosis admittedly suffers from some unique defects—its known effects include increased suggestibility, a tendency to "confabulate" or fill in gaps with fictitious details, an inability to sift fantasy from fact and an unwarranted boost in the subject's confidence in what he is relating. See *Rock v. Arkansas*, 483 U.S. 44, 58-60; *People v. Boudin*, 460 N.Y.S.2d 879, 881 (Sup. Ct. 1983); Note, *The Admissibility of Hypnotically Induced Testimony*, 55 Tenn. L. Rev. 785, 791-794 (1988). Furthermore, subjects of hypnosis report an "experience of responding involuntarily." *Rock*, 484 U.S. at 59 (citation omitted).[2]

[2] This fact would seem to support plaintiff's contention that she was questioned against her will. We note that plaintiff did consent initially to the hypnosis, which militates against a conclusion that the session was coercive; persons who undergo polygraph examinations often "communicate" involuntarily, but their consent to be hooked up to the apparatus is deemed constitutionally acceptable. Still, eliciting verbal responses from a subject who has limited ability to control the direction or content of her thoughts is different from eliciting physical, nonverbal cues, and more troubling. For the reasons set forth below, however, we do not reach a conclusion on whether plaintiff was coerced.

The plaintiff in this case was allegedly subjected while in a vulnerable and highly suggestible hypnotic state to bullying and intimidation from the investigative officers, approved (and later concealed) by the defendant. This is a disturbing scenario that conceivably could skirt the edges of constitutional propriety. However, our inquiry directs us not only to the existence of a constitutional violation, but to its clarity in light of legal precedent in determining whether qualified immunity exists. Unlike the first question, this issue presents no difficulty.

II.

To show that the law on a particular subject was clearly established, plaintiffs are not required to supply case law on all fours with the facts and law involved. *See Anderson v. Creighton*, 483 U.S. 635, 640; *McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992). Yet neither can they rely solely on a broadly worded proscription when the conduct in question is narrow and circumscribed. Plaintiff here must offer more than the fact that federal case law clearly frowns on coercive interrogation; she must demonstrate that coercive interrogation clearly includes hypnosis, and did so at the time of the events in question. State officials " 'need not predict [the law's] evolution, need not know that in the fight between broad and narrow readings of a precedent the broad reading will become ascendant.' " *Smith v. Fruin*, 28 F.3d 646, 650 (7th Cir. 1994) (quoting *Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991)).

Plaintiff thus would need to cite more specific precedent than the basic line of coercion cases to persuade this Court that the United States Constitution clearly proscribed hypnosis of a suspect at the time of her interrogation. Unfortunately for plaintiff, neither the federal nor the state case law she cites is up to the task. Our own search reveals that in 1982, the time of the complained-of conduct, courts were split on the validity of admitting confessions from suspects who complained that they had been hypnotized; but few, if any, courts posed

the inquiry in constitutional terms—and several were unwilling to exclude statements from suspects who had been hypnotized. See *Coon v. State*, 380 So.2d 980 (Ala. Crim. App. 1979) (admitting confession of defendant whom police had previously hypnotized), *aff'd*, 380 So.2d 990 (Ala. 1980), *and vacated on other grounds*, 449 U.S. 810; *People v. Norcutt*, 255 N.E.2d 442 (1970) (admitting confession over claims that it was obtained involuntarily, through hypnosis); *State v. Walker*, 416 S.W.2d 134 (Mo. 1967) (admitting defendant's confession despite contention police had taken defendant to hypnotist); but see *Leyra v. Denno*, 347 U.S. 556 (1954) (refusing admission of confession elicited through mental coercion); Comment, *Hypnosis of the Accused: Defendant's Choice*, 75 J. Crim. L. 995, 1000 n.22 (collecting other cases where courts excluded hypnotically induced confessions as unreliable).

The lone United States Supreme Court case to address the constitutionality of admitting a suspect's hypnotically refreshed testimony is similarly unavailing. That 1987 case, *Rock v. Arkansas*, held that a *per se* rule barring such testimony, which the state of Arkansas was enforcing to prevent the petitioner from introducing exculpatory evidence about her actions in the shooting death of her husband, violated the suspect's constitutional rights to testify and conduct a defense. 483 U.S. 44. The Supreme Court's lengthy discussion regarding the lack of consensus among courts and practitioners on the issue of whether hypnotically refreshed testimony should be admissible does little to bolster plaintiff's contention that the constitutionality of hypnosis, even of a suspect, was clearly established even by 1987. *Id.* at 57-58 & nn.14-16. *Rock*, which protected a suspect's right to undergo hypnosis for the purpose of bolstering her defense, further undermines plaintiff's claim that defendant should have been aware that the use of hypnosis would violate her constitutional rights.

Plaintiff also cites several Indiana cases that discuss hypnosis. These state law cases concern the evidentiary

flaws inherent in hypnotically induced testimony. In *Pearson v. State*, 441 N.E.2d 468, 472 (Ind. 1982), the Indiana Supreme Court noted that "hypnotically recalled testimony is often a mixture of fact and fantasy." In *Strong v. State*, that same court stated that "the better reasoned cases hold that evidence derived from a witness while he is in a hypnotic trance is inherently unreliable and should, therefore, be excluded as having no probative value." 435 N.E.2d 969, 970 (Ind. 1982) (footnote and citations omitted). But see *Gentry v. State*, 471 N.E.2d 263 (Ind. 1984) (although generally inadmissible at trial, evidence obtained through hypnosis may serve as basis for probable cause).

The gist of these cases appears to be that the Indiana Supreme Court has a strong suspicion of the evidentiary value of hypnotically refreshed testimony, especially when unsupported by other evidence. Regardless of the wisdom of admitting hypnotically refreshed testimony, however, these cases are silent regarding the constitutionality of doing so. There is no language in any of the Indiana cases which even addresses the issue of whether a suspect may constitutionally be asked to submit to hypnosis. In sum, it certainly cannot be said that such a right was "clearly established" at the time of the alleged violation. For this reason, we affirm the district court's grant of summary judgment on the finding that defendant possessed qualified immunity from suit.

III.

Plaintiff also asks this Court to deny summary judgment on the ground that defendant's actions in instructing the officers that they likely had probable cause to arrest her were clearly unconstitutional. This, too, is a question we review *de novo*. *Maltby v. Winston*, 36 F.3d 548, 555 & n.7 (7th Cir. 1994). In retrospect, defendant may indeed have erred in concluding that the hypnotic session provided probable cause for the arrest. Qualified immunity, however, applies to officers who "reasonably but mistakenly conclude that probable cause is present." *Hunter*

v. Bryant, 112 S. Ct. 534, 536. Defendant's advice to the officers was a reasonable response to being informed that plaintiff had made inculpatory statements and to viewing the videotape in which she made these statements. Defendant relied not only on his own judgment, but on the authority of a trained psychiatrist who advised him that plaintiff presented strong signs of multiple personality disorder. In light of these facts, it appears that defendant acted reasonably in concluding that probable cause existed. We therefore affirm the district court's grant of summary judgment on behalf of defendant with respect to the probable cause finding, as well as to the authorization of plaintiff's hypnosis.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CATHY BURNS,

Plaintiff,

vs.

RICK REED,

Defendant.

IP 85-155-C

MEMORANDUM ENTRY ON ORDER GRANTING SUMMARY JUDGMENT

1. Factual Background

This case comes before the court on remand from the United States Supreme Court. See Burns v. Reed, 111 S.Ct. 1934 (1991). The relevant facts, as summarized by the Court, are:

On the evening of September 2, 1982, Petitioner Cathy Burns called the Muncie, Indiana, Police and reported that an unknown assailant had entered her house, knocked her unconscious, and shot and wounded her two sons while they slept. Two police officers, Paul Cox and Donald Scroggins, were assigned to investigate the incident. The officers came to view Petitioner as their primary suspect, even though she passed a polygraph examination and a voice stress test, submitted exculpatory handwriting samples, andrepeatedly denied shooting her sons.

Speculating that Petitioner had multiple personalities, one of which was responsible for the shootings, the officers decided to interview Petitioner under hypnosis. They became concerned, however, that hypnosis might be an unacceptable investigative technique, and therefore sought the advice of the Chief Deputy Prosecutor, respondent, Richard Reed. Respondent told the Officers that they could proceed with the hypnosis.

While under hypnosis, petitioner referred to the assailant as "Katie" and also referred to herself by that name. The officers interpreted that reference as supporting their multiple-personality theory. As a result, they detained petitioner at the police station and sought respondent's advice about whether there was probable cause to arrest petitioner. After hearing about the statements that petitioner had made while under hypnosis, respondent told the officers that they "probably had probable cause" to arrest petitioner. See Tr. 108; see also Tr. 221. Based on that assurance, the officers placed petitioner under arrest.[1]

The next day, respondent and Officer Scroggins appeared before a county court judge in a probable cause hearing, seeking to obtain a warrant to search petitioner's house and car. During that hearing, Scroggins testified, in response to respondent's questioning, that petitioner had confessed to shooting her children. Neither the officer nor respondent informed the judge that the "confession" was obtained under hypnosis or that petitioner had otherwise consistently denied shooting her sons. On the basis of the misleading presentation, the judge issued a search warrant.

Petitioner was charged under Indiana law with attempted murder of her sons. Before trial, however, the trial judge granted petitioner's motion to suppress the statements given under hypnosis. As a result, the prosecutor's office dropped all charges against petitioner.

Id. at 1937 (footnote in original).

Burns filed her civil rights, action pursuant to 42 U.S.C. § 1983 on January 31, 1985, alleging that Reed's conduct violated her constitutional rights under color of state law.[2]

The case proceeded to trial on October 31, 1988. At the conclusion of Burns's Case in chief, Judge Dillin granted Reed's motion for a directed verdict, finding that Reed was protected by absolute immunity in connection with all his conduct in this matter.

The Seventh Circuit affirmed Judge Dillin's ruling. Burns v. Reed, 894 F.2d 949 (7th Cir. 1990). The United States Supreme

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[1] Following her arrest, petitioner was placed in the psychiatric ward of a state hospital for four months. During that time, she was discharged from her employment, and the State obtained temporary custody of her sons. The medical experts at the hospital eventually concluded that petitioner did not have multiple personalities, and she was released.

[2] Burns's complaint also named several other defendants, all of whom subsequently were dismissed or settled. Reed is the only remaining defendant.

Court partially reversed the Seventh Circuit in Burns v. Reed, 111 S.Ct. 1934 (1991). The Court held that Reed was entitled to absolute immunity for his conduct in court and in seeking the search warrant. However, the Court refused to extend absolute immunity to Reed's advising the officers concerning the hypnosis and whether probable cause existed to arrest Burns. The case returns to this court (and was reassigned to this judge, presumably by virtue of Circuit Rule 36 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit) for resolution of these two issues:[3]

1. Whether Burns is entitled to recover from Reed for permitting the officers to hypnotize her; and

2. Whether Burns may recover from Reed for advising the officers that probable cause existed for Burns's arrest.

Reed maintains that he is entitled to qualified immunity on each of these issues. Consequently, Reed moved for summary

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[3] Burns attempts at this stage of the case to assert a malicious prosecution claim arising from Reed's involvement with seeking a search warrant. However, such a claim is barred because the Supreme Court held that Burns's complaint failed to state a malicious prosecution claim. Burns, 111 S.Ct. at 1940, 1940-41 & n-5 "[P]etitioner has challenged only respondent's participation in the hearing, and not his motivation in seeking the search warrant or his conduct outside the courtroom relating to the warrant." Id. at 1940. This court is bound by the Court's findings.

To the extent that the Seventh Circuit and the Court affirmed Judge Dillin's judgment (including issues concerning procurement of the search warrant), such judgment is final and binds this court "Absent unusual circumstances, a judgment affirmed is final for res judicata purposes as to those parts of the action no longer subject to litigation...." Merrimack St. Garage v. General Motors Corp., 667 F. Supp. 41, 44 (D.N.H. 1987). On remand, a court should consider only those matters left open by the reviewing court's mandate. Quern v. Jordan , 440 U.S. 332, 347 n.18 (1979). Because the Court found that Burns's complaint did not state a claim for malicious prosecution, and it further found that Reed enjoyed absolute immunity for his conduct in seeking the search warrant, the malicious prosecution claim that Burns attempts to make now is not properly before this court. The Court did not leave any malicious prosecution claim open for this court's consideration.

judgment, contending that there are no material facts in dispute and that he is entitled to judgment as a matter of law.

Burns argues that Reed raised the issue of qualified immunity in prior motions, which were denied. However, a review of Judge Dillin's rulings, as urged by the plaintiff, discloses that Judge Dillin focused his qualified immunity analysis of Reed's conduct on the concealment of the hypnosis from the Magistrate. See District Court's Entries of Feb. 26, 1986 at p. 9 and May 1, 1987 at p. 10. After the Court's decision in this case, it is beyond debate that Reed's conduct in that regard was subject to absolute immunity. Thus, the denial of those earlier qualified immunity motions does not preclude the court from considering that defense in the different context in which it is now raised, that is, in connection with the advice rendered to the police officers. Besides, through the presentation of the plaintiff's case at trial, the court is presented with a more full explication of facts than available to Judge Dillin prior to his pretrial rulings. Accordingly, the assertion of this defense is not a repetitive effort to have the court revisit a subject adequately encompassed by Judge Dillin's prior rulings.

III. Standard for Summary Judgment

"Summary judgment is designed to head off a trial if the opposing party does not have a reasonable prospect of prevailing before a reasonable jury -- that is, a jury that will base its decision on facts and the law, rather than on sympathy or antipathy or private notions of justice. Karazanos v. Navistar Internat'l Transp. Corp., 948 F.2d 332, 338 (7th Cir. 1991).

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the movant shows. by pleadings, discovery and affidavits that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Renovitch v. Kaufman, 905 F.2d 1040, 1044 (7th Cir. 1990).

Thus, to survive summary judgment, the nonmovant must present affirmative evidence, and may not rely on conclusory allegations or speculation about what might be adduced later at trial. Cain v. Lane, 857 F-2d 1139, 1142 (7th Cir. 1988); Dale v. Chicago Tribune Co., 797 F.2d 458, 465 n.8 (7th Cir. 1986), cert. denied, 479 U.S. 1066 (1987). Furthermore, a factual dispute must be outcome determinative to preclude summary judgment. Donald v. Polk County, 836 F.2d 376, 379 (7th Cir. 1988) .

The plaintiff must "present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue

of fact that requires a trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

In determining whether a genuine issue of material fact exists, the court construes all evidence in the light most favorable to the party opposing the motion for summary judgment. Oxman v. WLS-TV, 846 F.2d 448, 452 (7th Cir. 1988).

"[A]t the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. In other words, "[t]lhe trial court cannot resolve factual disputes that could go to a jury at trial, but weak factual claims can be weeded out through summary judgment motions." Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 476 (7th Cir. 1988).

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Thus, Reed has the burden of proving that the material facts are not in dispute and that he is entitled to summary judgment as a matter of law.

However, because Burns would have the burden of proof at trial, Reed may meet his burden "by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial." Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 896 (3rd Cir. 1986), cert. denied, 483 U.S. 1052 (1987), citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The nonmovant, Burns, must then "'set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)).

IV. Prosecutorial Immunity

Immunity in General

A prosecutor enjoys absolute immunity from suits for damages under 42 U.S.C. § 1983 for conduct "initiating a prosecution and in presenting the state's case." Imbler v. Pachtman, 424 U.S. 409, 431 (1976).

As the Burns Court stated,

> Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected

> with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.

111 S.Ct. at 1943 (citation omitted)(emphasis in original). In contrast, prosecutors do not enjoy absolute immunity in connection with conduct not intimately associated with judicial proceedings. For example, with regard to prosecutorial advice given to officers during the investigative stage of a criminal case, the Burns Court stated,

> We do not believe [] that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process' . . . that it qualifies for absolute immunity.

(quoting Imbler, 424 U.S. at 430). Thus, a prosecutor who improperly advises police officers before an arrest may face personal liability, or he may be protected by qualified immunity.

In terms of qualified immunity,

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (emphasis added). The Burns Court stated that qualified immunity "'provides ample support to all but the plainly incompetent or those who knowingly violate the law.'" 111 S.Ct. at 1944 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

Qualified Immunity

Whether a governmental official is entitled to qualified immunity for allegedly unlawful conduct depends on the "objective legal reasonableness" of the conduct. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982). Courts consider such reasonableness in light of the "clearly established" legal rules existing when the conduct occurred. Id. at 818. In other words, the unlawfulness of the conduct must be apparent in light of preexisting law.

> [Tlhe right that the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense; The contours

> of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action in question is protected by qualified immunity unless the very action has previously been held unlawful; but it is to say that in light of preexisting law, the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citation omitted).

The Seventh Circuit applies a two-step inquiry to the qualified immunity test:

> First, to determine whether the law was clearly established at the time of the defendants' alleged violation, this court asks "whether the law was clear in relation to the specific facts confronting the public official when he or she acted." The plaintiff bears the burden of convincing the court of the existence of the clearly established constitutional right at issue. Second, to evaluate the objective legal reasonableness of the defendants' conduct, this court asks whether a constitutional right is so established that reasonably competent officers would agree on its application to a given set of facts.

Apostol v. Landau, 957 F.2d 339, 341-42 (7th Cir. 1992) (citations omitted)(emphasis added).

Reed's Authorization of the Hypnosis Session

To succeed on her § 1983 claim, Burns must show that she was deprived of a federally guaranteed right, and that the deprivation occurred Under color of state law. Id. See also Williams v. Duckworth, 598 F. Supp. 9, 14 (N.D. Ind. 1983) citing Parratt v. Taylor, 451 U.S. 527, 535 (1981).

Burns claims that Reed violated her constitutional rights when he authorized the officers to hypnotize her. The record clearly establishes that the officers did not inform Reed that Burns had passed polygraph and voice stress tests. Nor did they advise Reed of how long she had been at the police station, that she had become ill while at the police station, that police officers had threatened her, or that she had been deprived of lunch. Although Reed advised the officers to go ahead with the hypnosis, he was in no way involved with the hypnotic session or the investigation leading up to the session. Further, Reed did not advise the officers how to conduct the session.

The question here is whether authorizing the hypnosis deprived Burns of a clearly established constitutional right, and if so whether

Reed reasonably should have been aware that authorizing the hypnosis would result in such a violation.[4]

Two months before Reed authorized the Burns hypnosis, the Indiana Supreme Court ruled on the admissibility of evidence obtained from a witness under hypnosis. See Strong v. State, 435 N.E.2d 969 (Ind. 1982). In Strong, the court held that a composite drawing was inadmissible at trial because the composite was drawn from a witness's description of the defendant given while the witness was under a hypnotic trance. The court concluded that the evidence derived during hypnosis should have been excluded at trial, apparently because such evidence is inherently unreliable, and is not susceptible of cross examination. Id. at 970.

Reed is held to have known the law as it existed when he authorized the Burns hypnosis, including the existence of the Strong opinion. Thus, he is held to have known that the information obtained from the Burns hypnosis would be inadmissible at trial. However, because Strong involved only admissibility at trial, it sheds little light on whether the information garnered from the hypnosis session could be the basis for probable cause. No case law existed in 1982 to guide Reed regarding the propriety of using evidence obtained through hypnosis to establish probable cause for arrest.

Interestingly, in 1984, the Indiana Supreme Court held that although generally not admissible at trial, evidence obtained through hypnosis may be used to establish probable cause for arrest. See Gentry v. State, 471 N.E.2d 263 (Ind. 1984).

> Experts generally agree that hypnosis is a reliable investigative tool which can be used to provide valuable leads for investigation. Unlike the fact finders in the Courtroom, the investigator does not need to make subjective evaluations of the truth or falsity of the hypnotic recall but only uses the leads he obtains for the purpose of subsequent investigation and verification.

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[4] This court will not address matters such as the technique used during the hypnosis or whether Burns's consent was obtained because Reed was not involved in those matters. The extent of Reed's involvement with the hypnosis was to authorize it based on Scroggins's telling him over the telephone that he and Cox wanted to hypnotize Burns because she was the only person who could provide additional information in the investigation. Scroggins further told Reed that because Burns was a suspect, they were concerned about the propriety of hypnotizing her.

Id.

Burns cites Leyra v. Denno, 347 U.S. 556 (1954) for the proposition that the use of confessions coerced from suspects while under hypnosis does not comport with notions of due process. In Leyra, the police brought in a doctor purportedly to assist in relieving a suspect's sinus headaches. The doctor was in fact a psychiatrist with considerable knowledge of hypnosis. The suspect was physically and emotionally exhausted, having been subjected to several days and nights of intermittent, intensive police questioning and having slept only about an hour and a half in the 32 hours before his encounter with the doctor. While in an almost "trance-like" state, the suspect made incriminating statements in response to the psychiatrist's subtle and suggestive questions. The Court held that "use of confessions abstracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by the Constitution." Id. at 561. Unlike the present case, Leyra involved the inadmissibility of confessions "coerced" through hypnosis. Further, Leyra differs from this case because here the officers told Burns that they would like to hypnotize her, and she consented. The officers also failed to disclose to Reed any physical or psychological deprivations that Burns may have suffered prior to the hypnosis session. In responding to this summary judgment motion, Burns has failed to identify any evidence in the videotape of the hypnosis session that would have made a person viewing the session, such as Reed, aware of such prior deprivations. Thus, although Leyra involved a hypnotically induced confession, it is not germane because Burns consented to being hypnotized, because Reed was not aware of the treatment of the plaintiff prior to the hypnosis session and because the admissibility of the hypnotically obtained evidence at trial was not yet at issue.

Burns's brief refers the court to "Exhibit A," a sheet containing a string of citations of no less than 73 cases and scholarly articles regarding hypnosis techniques. Burns lists, but does not analyze, these materials. Only three of the cases listed are Indiana cases decided prior to the hypnosis session in this case. None was decided by the Seventh Circuit or United States Supreme Court. The three Indiana cases deal with the admissibility of hypnotically induced evidence at trial, do not hold that hypnotizing a suspect is unconstitutional, and are further distinguishable from the situation Reed faced in September of 1982 as follows;

In Merrifield v. State, 400 N.E.2d 146 (Ind. 1980), the appellant was convicted of rape and related crimes. On appeal, he argued among other things that the trial court erred in admitting the victim's identification testimony into evidence because the police had hypnotized her several days after the incident. The Indiana

Supreme Court upheld the conviction, and held that because the victim clearly identified the appellant from a photo display twice before the hypnosis, the use of hypnosis had no effect on the identification. Id. at 149. The court further hold that the hypnosis had no effect on the identification because the victim had made an in-court identification of the appellant without objection. Id. Thus, Merrifield would not have instructed Reed that authorizing Burns's hypnosis would violate her constitutional rights.

In Pavone v. State, 402 N.E.2d 976 (Ind. 1980), the defendant appealed his, murder conviction. The Indiana Supreme Court held that the trial court properly denied the defendant's motion in limine and offer to prove regarding a witness's hypnosis because the appellant did not establish how the witness's testimony was influenced by hypnosis. A videotape of the hypnosis session was available to the appellant and could have been used to demonstrate any evidence of taint or prejudice to the appellant. Id. at 979-80. Like Merrifield, Pavone would not have instructed Reed that authorizing the Burns hypnosis would violate her constitutional rights.

Similarly in Alleyn v. State, 427 N.E.2d 1095 (Ind. 1981), the defendant appealed a voluntary manslaughter conviction, asserting among other things that it was error for the State to hypnotize an eyewitness without first notifying the defense because it deprived the defendant of an opportunity to attack the witness's credibility on the witness stand. However, the Indiana Supreme Court held that the record did not indicate that the witness had, in fact, been hypnotized. Id. at 1098. Further, the court held that the appellant could not point to any prejudice arising from the alleged use of hypnosis. Id. Alleyn, like the other two cases Burns cites regarding the state of the law in 1982 regarding hypnosis would in no way put Reed on notice that authorizing Burns's hypnosis would violate her constitutional rights.

Upon its own cursory[5] review of these materials Burns cites, the court concludes that they did not put Reed on notice that hypnotizing suspects is per se unconstitutional. Nor do they define the constitutional parameters for the techniques to be utilized during hypnosis of suspects. At best, Exhibit "A" constitutes an interesting collection of cases from various jurisdictions on the evidentiary value of information gathered through the use of

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[5] Plaintiff's technique of referring to an exhibit in this way as part of her argument, effectively using a 73 case string cite (not to mention the numerous scholarly articles), deserves nothing more than a limited review. Unguided by counsel's analysis of these authorities, the court is left to its own uncharted journey through this mass of material.

hypnosis and scholarly articles critiquing the use of hypnosis in those endeavors.

Burns has cited no constitutional, statutory, or case law, and the court knows of none, from which Reed should have surmised that it was a violation of any constitutional right to hypnotize a suspect. Likewise, there is no law indicating that it is a violation of any constitutional right to authorize hypnosis of a suspect. Without a constitutional violation, Burns has no basis for a claim under § 1983.

Accordingly, the doctrine of qualified immunity protects Reed in connection with his authorizing the officers to hypnotize Burns.

Reed's Advice Regarding Burns's Arrest

Reed's only involvement in Burns's arrest was in advising the officers that he believed probable cause existed. The officers, and not Reed, actually arrested Burns. The question here is whether Reed's advising the officers violated Burns's constitutional rights, and if so, whether Reed is protected by qualified immunity.

The officers told Reed that while under hypnosis, Burns confessed to shooting her sons. Reed spoke with Dr. Kenneth Joy, a clinical psychologist, who viewed the video tape of the hypnosis session and interviewed Burns. Dr. Joy indicated to Reed that Burns might have a multiple personality, and that a second, distinct personality could have committed the crime.

Reed contends that he did not view the video tape. Conversely, Officer Cox testified that he observed Reed view it. For purposes of considering Reed's motion for summary judgment, the court must construe all evidence in the light most favorable to Burns. Therefore, for purposes of this motion, the court assumes that Reed viewed the video tape.

Accordingly, the court must determine whether Burns met her burden of proving that Reed, as a reasonable officer viewing the video, hearing the presentation of evidence by the police officers and Dr. Kenneth Joy, would have known that the officers violated Burns's constitutional rights during the hypnosis session, and that in basing his advice that probable cause existed on the improper hypnosis session, Reed violated Burns's clearly established constitutional right.

> Once the defendant's actions are defined or characterized according to the specific facts of the case this characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established

> law. it is the plaintiff who bears the burden of establishing the existence of the allegedly clearly established constitutional right. The factual circumstances of the alleged violation need not be "identical" to prior holdings in order to find an officer entitled to qualified immunity. Nonetheless, closely analogous cases, those decided before the defendants acted or failed to act, are required to find that a constitutional right is clearly established.

Rakovich v. Wade, 850 F.2d 1180, 1209 (7th Cir.), cert. denied, 488 U.S. 968 (1988).

Burns states categorically that anyone viewing the video tape would know that the hypnosis session was conducted improperly, and accordingly, Reed should have known that it was inappropriate to base his advice that probable cause existed on the hypnosis session. However, this broad brush allegation is inadequate. It certainly fails to meet the requirements of Federal Rule of Civil Procedure 56(e) and Local Rule 56.1 which require Burns to "set forth specific facts showing that there is a genuine issue for trial" and to make "appropriate citations to discovery responses, affidavits, depositions, or other admissible evidence" with respect to all material facts on which there is a genuine issue for trial. Burns fails to specify any particular point in the video tape where it would have been obvious to Reed that the hypnosis was improper under Leyra. For example, Burns does not indicate where in the video it should have been apparent to Reed that Burns was tired, sick, or hungry. Even if Burns had pointed to such evidence in the tape, all it would have indicated to Reed, under Leyra, is that the confession would be inadmissible at trial. As discussed above, neither the state of the law in 1982 nor as it exists today would indicate that basing probable cause on hypnotically induced information results in deprivation of constitutional rights. Indeed, as Gentry v. State subsequently clarified, such information may suffice to establish probable cause for an arrest. 471 N.E.2d 263 (Ind. 1984).

Additionally, Dr. Joy--a clinical psychologist--advised Reed that Burns may have multiple personalities, one of whom may have shot her sons. Dr. Joy based his opinion on his review of the videotape and his personal interview with Burns. Dr. Joy did not give the hypnosis session a negative critique.

Moreover, when Reed advised the officers that he believed probable cause existed to arrest Burns, no statute or case law existed to apprise Reed of whether the hypnosis session had been conducted improperly and should not have been the basis for probable cause.

The court concludes that Burns has not met her burden of proving that Reed should have known that the officers violated Burns's constitutional rights during the hypnosis session. The cases Burns cites in now way show that prior to Reed's advice concerning probable cause, any constitutional, statutory, or case law indicated that a citizen has a constitutional right not to have a prosecutor vase his advice concerning the existence of probable cause on a video tape of an improper hypnosis session. Reed did not arrest Burns. Moreover, when Reed advised the officers that he believed probable cause existed to arrest Burns, he was unaware of the circumstances and conditions under which Burns agreed to be hypnotized.

As Judge Dillin indicated at trial, Reed may have been negligent in the way he scrutinized, or failed to scrutinize, the evidence before giving the advice. However, "where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required." Davidson v. Cannon, 474 U.S. 344, 348 (1986) (§ 1983 case involving prison official's negligence in failing to protect inmate).[6] As the Burns Court stated, qualified immunity protects all but the "plainly incompetent or those who knowingly violate the law." Burns, 111 S.Ct. at 1944 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986). Burns failed to show that Reed was incompetent or that he knowingly violated a law. Additionally, Burns failed to show that it was unreasonable for Reed to base his conclusion that probable cause existed on the contents of the video tape and what the officers had told him. When officials reasonably but mistakenly believe that probable cause exists, they should not be held personally liable.

> [I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated in such cases those officials--like other officials who act in ways they reasonably believe to be lawful--should not be held personally liable.

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[6] In Davidson, the petitioner (an inmate) sent a note to the assistant superintendent of the prison reporting that a fellow inmate had threatened him. The assistant superintendent read the note and sent it to the corrections sergeant who, although aware of the notes contents, did not read it or notify other officers of the threat. Two days later, the inmate attacked and seriously injured the petitioner. The petitioner sued under § 1983. The Court held that the respondents' lack of due care did not approach the sort of abusive government conduct that the Due Process Clause was designed to protect [sic].

Anderson v. Creighton, 483 U.S. 635, 641 (1987).

Because Burns failed to establish that Reed violated clearly established law in connection with advising the officers that probable cause existed, Reed is entitled to qualified immunity.

V. CONCLUSION

The court finds that no genuine issues of material fact are in dispute. Accordingly, it will grant summary judgment on Reed's behalf and against Burns on the two remaining claims in this cause on the basis of the doctrine of qualified immunity.

ALL OF WHICH IS ENTERED this 26th day of February, 1993.

/s/ John Daniel Tinder
John Daniel Tinder, Judge
United States District Court

42 U.S.C. § 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable to the District of Columbia shall be considered to be a statute of the District of Columbia.

Indiana Code 33-14-1-3 reads as follows:

Duty when informed of crimes.—Whenever any prosecuting or district attorney shall receive information of the commission of any felony or such district attorney of the commission of any misdemeanor he shall cause process of issue from a court having jurisdiction to issue the same, (except the circuit court,) to the proper officer, directing him to subpoena the persons therein named likely to be acquainted with the commission of such felony or misdemeanor, and shall examine any person so subpoenaed before such court touching such offense; and if the facts thus elicited are sufficient to establish a reasonable presumption of guilt against the party charged, said court shall cause so much of said testimony as amounts to a charge of a felony or misdemeanor to be reduced to writing and subscribed and sworn to by such witness, whereupon such court shall cause process to issue for the apprehension of the accused, as in other cases.

Indiana Code 35-33-1-1 reads as follows:

Arrest by law enforcement officers.—A law enforcement officer may arrest a person when:

(1) He has a warrant commanding that the person be arrested;

(2) He has probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit a felony;

(3) He has probable cause to believe the person has violated the provisions of IC 9-4-1-40, IC 9-4-1-54 [repealed], or IC 9-11-2; or

(4) He has probable cause to believe the person is committing or attempting to commit a misdemeanor in his presence [IC 35-33-

1-1, as added by Acts 1981, P.L.298, § 2; P.L. 204, §6; P.L. 320-1983, § 2].

Indiana Code 35-41-1-17 reads as follows:

Law enforcement officer.—"Law Enforcement Officer" means:

(1) A police officer, sheriff, constable, marshal, or prosecuting attorney;

(2) A deputy of any one of those persons; or

(3) An investigator for a prosecuting attorney. [IC 35-41-1-17 as added by P.L. 311-1983, § 18].